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DEPARTMENT OF EDUCATION

34 CFR Parts 200 and 300

RIN 1810-AB16

Docket ID ED-2012-OESE-0018

Improving the Academic Achievement of the Disadvantaged;  
Assistance to States for the Education of Children with  
Disabilities

AGENCY: Office of Elementary and Secondary Education,  
Office of Special Education and Rehabilitative Services,  
Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing title I, Part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (the "Title I regulations"), to no longer authorize a State to define modified academic achievement standards and develop alternate assessments based on those modified academic achievement standards for eligible students with disabilities. In order to make conforming changes to ensure coordinated administration of programs under title I of the ESEA and the Individuals with

Disabilities Education Act (IDEA), the Secretary is also amending the regulations for Part B of the IDEA. Note: Nothing in these regulations changes the ability of States to develop and administer alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities or alternate assessments based on grade-level academic achievement standards for other eligible students with disabilities in accordance with the ESEA and the IDEA, or changes the authority of IEP teams to select among these alternate assessments for eligible students.

DATES: These regulations are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For further information regarding the Title I regulations, contact Monique M. Chism, U.S. Department of Education, 400 Maryland Avenue, SW., room 3W224, Washington, DC 20202-6132. Telephone: (202) 260-0826.

For further information regarding the IDEA regulations, contact Mary Louise Dirrigl, U.S. Department of Education, 550 12th St., SW., Potomac Center Plaza, room 5156, Washington, DC 20202-2641. Telephone: (202) 245-7324.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Background: High standards and high expectations for all students and an accountability system that provides teachers, parents, students, and the public with information about students' academic progress are essential to ensure that students graduate from high school prepared for college and careers in the 21st century. In 2007, the Department amended the Title I regulations to permit States to define modified academic achievement standards for eligible students with disabilities and to assess those students with alternate assessments based on those modified academic achievement standards. The Department promulgated those regulations based on the understanding that (1) there was a small group of students whose disabilities precluded them from achieving grade-level proficiency and whose progress was such that they would not reach grade-level achievement standards in the same time frame as other students, and (2) the regular State assessment would be too difficult for this group of students and the assessment based on alternate academic achievement standards would be

too easy for them. 72 FR 17748 (Apr. 9, 2007). In addition, at that time, the Department acknowledged that measuring the academic achievement of students with disabilities, particularly those eligible to be assessed based on modified academic achievement standards, was “an area in which there is much to learn and improve” and indicated that “[a]s data and research on assessments for students with disabilities improve, the Department may decide to issue additional regulations or guidance.” 72 FR 17748, 17763 (Apr. 9, 2007).

Since these regulations went into effect, additional research<sup>1</sup> has demonstrated that students with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided. For example, a research study conducted a meta-analysis of 70 independent studies investigating the effects of special education interventions on student achievement. The study found that children with disabilities made significant progress across different content areas and across different educational

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<sup>1</sup> See discussion of this research in Assessing Students with Disabilities Based on a State’s Academic Achievement Standards.

settings when they received systematic, explicit instruction; learning strategy instruction; and other evidence-based instructional strategies and supports.<sup>2</sup>

In addition, nearly all States have developed new college- and career-ready standards and new assessments aligned with those standards. These new assessments have been designed to facilitate the valid, reliable, and fair assessment of most students, including students with disabilities who previously took an alternate assessment based on modified academic achievement standards. For these reasons, we believe that the removal of the authority for States to define modified academic achievement standards and to administer assessments based on those standards is necessary to ensure that students with disabilities are held to the same high standards as their nondisabled peers, and that they benefit from high expectations, access to the general education curriculum based on a State's academic content standards, and instruction that will prepare them for success in college and careers.

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<sup>2</sup> See Scruggs, T., Mastropieri, M., Berkeley, S., & Graetz, J. (2010). Do Special Education Interventions Improve Learning of Secondary Content? A Meta-Analysis. *Remedial and Special Education*, 31(6), 437-449.

Public Comment: On August 23, 2013, we published in the Federal Register (78 FR 52467) a notice of proposed rulemaking (NPRM) that would amend the Title I regulations to no longer authorize a State to define modified academic achievement standards and administer alternate assessments based on those modified academic achievement standards for eligible children with disabilities. The NPRM established an October 7, 2013, deadline for the submission of written comments. Although the Federal eRulemaking Portal was in operation during the government shutdown in October 2013, which included the final seven days of the original public comment period, we recognized that interested parties reasonably may have believed that the government shutdown resulted in a suspension of the public comment period. To ensure that all interested parties were provided the opportunity to submit comments, we reopened the public comment period for seven days. The final due date for comments was November 23, 2013.

In response to our invitation in the NPRM, 156 parties submitted comments. We group major issues according to subject. In some cases, comments addressed issues beyond the scope of the proposed regulations. Although we appreciate commenters' concerns for broader issues

affecting the education of students with disabilities, because those comments are beyond the scope of this regulatory action, we do not discuss them here. Generally, we do not address technical and other minor revisions.

Analysis of Comments and Changes: An analysis of the comments and changes in the regulations since publication of the NPRM follows.

#### General Comments

Comments: Several commenters stated that general assessments that are accessible for all students are in the best interest of students with disabilities and provide better information about the achievement of those students for parents, educators, and the public. Several commenters pointed to developments in the field of assessment that are contributing to general assessments that are accessible for the vast majority of students. The commenters noted that using principles of “universal design for learning” and considering accessibility issues when designing assessments have resulted in more accessible general assessments and have eliminated the need for alternate assessments based on modified academic achievement standards. A few commenters urged the Department to promote the use of universal design for learning in developing assessments, as well as to

support the development of accessible assessments and accommodations for students with disabilities.

Discussion: Nearly all States have developed and are administering new high-quality general assessments that are valid and reliable and measure students with disabilities' knowledge and skills against college- and career-ready standards. Including students with disabilities in more accessible general assessments aligned to college- and career-ready standards promotes high expectations for students with disabilities, ensures that they will have access to grade-level content, and supports high-quality instruction designed to enable students with disabilities to be involved in, and make progress in, the general education curriculum - that is, the same curriculum as for nondisabled students.

In response to those commenters who urged the Department to support the adoption of universal design principles for student assessments, we note that the Department has a history of supporting and promoting universal design for learning, assessments that are accessible for all students, and appropriate accommodations for students with disabilities. Most recently, we included "universal design for learning" in defining "high-quality



assessments” required under the Race to the Top programs and the ESEA flexibility initiative<sup>3</sup>. We have also focused funding on improving the accessibility of assessments through the General Supervision Enhancement Grants (GSEG) and Enhanced Assessment Grants (EAG) programs.

Changes: None.

Comments: Some commenters from States that administered alternate assessments based on modified academic achievement standards discussed how these assessments were helpful in meeting the needs of students with disabilities. One commenter stated that the assessments improved instruction and student achievement while providing students with access to the general curriculum. A representative from a State educational agency (SEA) commented that five years of research and development went into developing their State’s alternate assessments, which are based on grade-level content, are aligned with college- and career-ready standards, and do not compromise academic rigor and expectations. The SEA representative stated that

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<sup>3</sup> ESEA flexibility refers to the Department’s initiative to give a State flexibility regarding specific requirements of the No Child Left Behind Act of 2001 in exchange for developing a rigorous and comprehensive plan designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction.

the existing regulations provide the most flexibility for States and that, without access to the State's alternate assessments based on modified academic achievement standards, students who would otherwise take the alternate assessments would no longer have the opportunity to demonstrate their knowledge and skills.

Discussion: We recognize that some States expended considerable resources to develop alternate assessments based on modified academic achievement standards. As one commenter suggests, these States' research and development efforts generated valuable information on how best to teach and assess students with disabilities. States may still use this information to prepare and support students to take the new general assessments aligned with college- and career-ready standards that States have developed since the Department issued the regulations in April 2007. Those assessments are more accessible to students with disabilities than those in place at the time States began developing alternate assessments based on modified academic achievement standards. The new general assessments will facilitate the valid, reliable, and fair assessment of most students with disabilities, including those for whom alternate assessments based on modified academic

achievement standards were intended. Moreover, we know the key to successful achievement of students with disabilities begins with appropriate instruction, services, and supports. More than six years of research spurred by the opportunity that States had to research, develop, and administer alternate assessments based on modified academic achievement standards have dramatically increased the knowledge base about students who are struggling in school. States that received funding from the Department through the GSEG and EAG programs to develop alternate assessments based on modified academic achievement standards focused on several topics, including the characteristics of students who were participating in such assessments, barriers to these students' learning and performance, and approaches to making assessments more accessible. For example, research in several States found that some students deemed eligible for taking alternate assessments based on modified academic achievement standards may not have had an opportunity to learn grade-level content, and that more effort was needed to support teachers in ensuring students have meaningful opportunities to learn grade-level content. Other research focused on the appropriateness of test items and identified various ways to improve the

accessibility of test items, such as adjusting format characteristics or content, or carefully examining the difficulty of the test items and making items more accessible and understandable (e.g., reducing unimportant or extraneous details) while still measuring grade-level content.<sup>4</sup> Therefore, we believe that alternate assessments based on modified academic achievement standards are no longer needed and, with high-quality instruction and appropriate accommodations, students with disabilities who took an alternate assessment based on modified academic achievement standards will be able to demonstrate their knowledge and skills by participating in the new general assessments.

Changes: None.

Comments: A parent whose child participated in an alternate assessment based on modified academic achievement standards expressed concern that, without the assessment, the child would not be able to graduate with a high school diploma. Another commenter asked that States be allowed to

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<sup>4</sup> For more information, see: Thurlow, M. L., Lazarus, S. S., & Bechard, S. (Eds.). (2013). *Lessons learned in federally funded projects that can improve the instruction and assessment of low performing students with disabilities*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

continue to administer alternate assessments based on modified academic achievement standards for State purposes, such as promotion decisions and graduation requirements. One commenter stated that the assessments allowed students with disabilities to be successful and meet State exit exam requirements.

Discussion: Under the final regulations, a State may no longer define modified academic achievement standards and administer alternate assessments based on modified academic achievement standards to meet ESEA requirements. Accordingly, these regulations do not affect State promotion decisions and graduation requirements because the Federal government does not set promotion or graduation standards for any students, including students with disabilities. Rather, States, and, in some cases, local educational agencies (LEAs), establish requirements for high school graduation and promotion.

However, we note that, regardless of State or local promotion or graduation requirements for a regular high school diploma, in order to ensure a free appropriate public education (FAPE) is made available to students with disabilities under the IDEA, individualized education programs (IEPs), including IEP goals, must be aligned with

the State's academic content standards, and contain the content required by the IDEA to enable students with disabilities to be involved in, and make progress in, the general education curriculum based on the State's academic content standards. Therefore, in order to ensure that a State makes FAPE available to all eligible students with disabilities,<sup>5</sup> promotion or graduation requirements for such students may not be lowered if doing so means including goals, special education and related services, and supplementary aids and services and other supports in a student's IEP that are not designed to enable the student to be involved in, and make progress in, the general education curriculum based on the State's academic content standards. The general education curriculum is the curriculum that is applicable to all children and is based on the State's academic content standards that apply to all children within the State.

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<sup>5</sup>The IDEA prescribes certain requirements for IEPs for students who take alternate assessments aligned to alternate academic achievement standards. 34 CFR 300.160(c)(2)(iii), 300.320(a)(2)(ii), and 300.320(a)(6)(ii). This approach addresses the educational and assessment needs of a relatively small percentage of students with the most significant cognitive disabilities, estimated at approximately 1% of all students in a State (approximately 10% of students with disabilities), who cannot be held to the same academic achievement standards as students without the most significant cognitive disabilities.

Changes: None.

Comments: Several commenters who expressed support for the proposed regulations noted that they are aligned with the requirements in several current Department programs, such as the requirement that assessments funded under the Race to the Top Assessment (RTTA) program be accessible to all students, including students with disabilities eligible to participate in an alternate assessment based on modified academic achievement standards; the requirement that State recipients of Race to the Top grants phase out alternate assessments based on modified academic achievement standards; and the requirement that SEAs phase out alternate assessments based on modified academic achievement standards as a condition of receiving ESEA flexibility.

One commenter who opposed the proposed regulations expressed an understanding that they are based on the premise that States have adopted Common Core State Standards, joined an RTTA consortium, or received waivers under ESEA flexibility. The commenter stated that aligning the proposed regulations with these initiatives would set policy for all States based on those participating in voluntary Department initiatives and would send a message

to States not participating in these initiatives that they are disadvantaged for not doing so. Another commenter expressed concern that the proposed regulations would result in permanent regulatory changes predicated on temporary ESEA flexibility waivers.

Discussion: The purpose of the these regulatory changes is to promote high expectations for students with disabilities by encouraging teaching and learning to high academic achievement standards for the grade in which a student is enrolled, measured by a State's general assessments. These regulations are driven by research and advances in the development of general assessments aligned with college- and career-ready standards that are more accessible to students with disabilities than those in place at the time States began developing alternate assessments based on modified academic achievement standards. The purpose of the regulations is not, as suggested by some commenters, to align them with voluntary Department initiatives. To clarify, State recipients of Race to the Top grants were not required to phase out alternate assessments based on modified academic achievement standards as a condition of the grants. States approved for ESEA flexibility did agree to phase out those assessments by school year 2014-2015;



however, these final regulations are not predicated on that agreement. Rather, the ESEA flexibility requirement is consistent with the purpose of the regulations to promote high expectations for students with disabilities by encouraging teaching and learning to high academic achievement standards for the grade in which a student is enrolled measured by a State's general assessments. Therefore, we disagree with the commenters who claimed that the regulations would set policy based on the Department's voluntary initiatives. Likewise, the regulations do not place any State at a disadvantage as a result of its decision not to participate in voluntary Department initiatives.

Changes: None.

Comments: One commenter expressed concern that the assessments being developed by the Partnership for Assessment of Readiness for College and Careers (PARCC), although based on universal design features to make them more accessible, will not eliminate the need for alternate assessments.

Discussion: The assessments being developed by States based on college- and career-ready standards, including those developed by PARCC and the Smarter Balanced

Assessment Consortium, do not eliminate the authority or need for States to administer alternate assessments based on alternate academic achievement standards for students with the most significant cognitive disabilities. States may also continue to administer alternate assessments based on grade-level academic achievement standards, consistent with 34 CFR 200.6(a)(2)(ii)(A). We note that the Department is supporting, through the GSEG program, the development of alternate assessments based on alternate academic achievement standards that will serve as companion assessments to the general assessments that States are developing and implementing.

Changes: None.

Comments: One commenter questioned the Department's authority to amend the Title I regulations in light of the negotiated rulemaking requirements in section 1901(b) of the ESEA, including the requirement that the rulemaking process be conducted in a timely manner to ensure that final regulations are issued by the Secretary not later than one year after the date of enactment of the No Child Left Behind Act of 2001 (NCLB). Similarly, the commenter questioned whether the proposed regulations meet the requirement in section 1908 of the ESEA that the Secretary

issue regulations for sections 1111 and 1116 of the ESEA not later than six months after the date of enactment of NCLB.

Discussion: The statutory requirements for negotiated rulemaking in section 1901(b) of the ESEA apply to title I standards and assessment regulations required to be implemented within one year of enactment of NCLB, not to subsequent regulatory amendments such as those included in these regulations. Similarly, with respect to the timeline for issuing regulations implementing title I, the requirements in sections 1901 and 1908 of the ESEA apply only to the issuance of initial regulations following enactment of NCLB, not to subsequent amendments such as these final regulations.

Changes: None.

Assessing Students with Disabilities Based on a State's Academic Achievement Standards

Comments: We received many comments on the standards to which students with disabilities should be held. Several commenters stated that all students should be held and taught to the same standards and that modified academic achievement standards and alternate assessments based on those standards inappropriately lower expectations for

students with disabilities and result in instruction that is less challenging than the instruction provided to their nondisabled peers. Other commenters stated that students with disabilities have the ability to learn grade-level content and can achieve at the same levels as their nondisabled peers when provided with appropriate instruction, services, and supports. One commenter stated that, when students receive instruction based on modified academic achievement standards, a negative cycle begins in which the students never learn what they need to succeed. One commenter stated that a State's standards and assessments should be designed to be appropriate for the vast majority of students with disabilities, with the exception of students with the most significant cognitive disabilities. Other commenters stated that a large number of students with disabilities taking alternate assessments based on modified academic achievement standards creates a separate education system for students with disabilities and focuses on students' limitations, rather than strengths.

On the other hand, some commenters stated that holding students with disabilities to the same standards as nondisabled students is unfair because students who qualify

for special education services have a disability that affects their academic functioning. They noted that what may be a high standard for one student may not necessarily be the same for another student, and that students with disabilities should take assessments that reflect realistic expectations for them.

Discussion: The importance of holding all students, including students with disabilities, to high standards cannot be over-emphasized. Low expectations can lead to students with disabilities receiving less challenging instruction that reflects below grade-level achievement standards, and thereby not learning what they need to succeed at the grade in which they are enrolled.

Although the Department agrees that some students may have a disability that affects their academic functioning, we disagree that students with disabilities, except for those with the most significant cognitive disabilities, should be held to different academic achievement standards than their nondisabled peers. Research demonstrates that low-achieving students with disabilities who struggle in

reading<sup>6</sup> and low-achieving students with disabilities who struggle in mathematics<sup>7</sup> can successfully learn grade-level content when they have access to high-quality instruction. The inclusion of students with disabilities in the new, more accessible general assessments will promote high expectations for students with disabilities, which research demonstrates is associated with improved educational

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<sup>6</sup> For example, see: Allor, J. H., Mathes, P. G., Roberts, J. K., Cheatham, J.P., & Champlin, T. M. (2010). Comprehensive reading instruction for students with intellectual disabilities. Psychology in the Schools, 47, 445-466; Kamps, D., Abbott, M., Greenwood, C., Wills, H., Veerkamp, M., & Kaufman, J. (2008); Mautone, J. A., DuPaul, G. J., Jitendra, A. K., Tresco, K. E., Junod, R. V., & Volpe, R. J. (2009). The relationship between treatment integrity and acceptability of reading interventions for children with attention-deficit/hyperactivity disorder. Psychology in the Schools, 46, 919-931; and Scammacca, N., Vaughn, S., Roberts, G., Wanzek, J., & Torgesen, J. K. (2007). Extensive reading interventions in grades K-3: From research to practice. Portsmouth, N.H.: RMC Research Corporation, Center on Instruction; and Vaughn, S., Denton, C. A., & Fletcher, J. M. (2010). Why intensive interventions are necessary for students with severe reading difficulties. Psychology in the Schools, 47, 32-444; Wanzek, J. & Vaughn, S. (2010). Tier 3 interventions for students with significant reading problems. Theory Into Practice, 49, 305-314.

<sup>7</sup> For example, see: Fuchs, L. S. & Fuchs, D., Powell, S. R., Seethaler, P. M., Cirino, P. T., & Fletcher, J. M. (2008). Intensive intervention for students with mathematics disabilities: Seven principles of effective practice. Learning Disabilities Quarterly, 31, 79-92; and Gersten, R., Beckmann, S., Clarke, B., Foegen, A., Marsh, L., Star, J. R., & Witzel, B. (2009). Assisting students struggling with mathematics: Response to Intervention (RtI) for elementary and middle schools (NCEE 2009-4060). Washington, DC: National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education. Retrieved November 1, 2010 from <http://ies.ed.gov/ncee/wwc/publications/practiceguides/>.

outcomes.<sup>8</sup> Therefore, we disagree with commenters' statements that it is unfair to hold students with disabilities, other than those with the most significant cognitive disabilities, to the same academic achievement standards as their nondisabled peers.

Changes: None.

Comments: Many commenters, mostly teachers and parents, stated that modified academic achievement standards and assessments based on those standards meet the needs of certain students with disabilities for whom the general assessment is too difficult. The commenters stated that the general assessment does not provide meaningful data on these students and that alternate assessments based on modified academic achievement standards allow students to demonstrate their knowledge, show progress, and experience success.

Several commenters expressed concern about providing

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<sup>8</sup> For example, see Archambault, I., Janosz, M., & Chouindard, R. (2012). Teacher beliefs as predictors of adolescent cognitive engagement and achievement in mathematics. The Journal of Educational Research, 105, 319-328; Hinnant, J., O'Brien, M., & Ghazarian, S. (2009). The longitudinal relations of teacher expectations to achievement in the early school years. Journal of Educational Psychology, 101(3), 662-670; and Hornstra, L., Denessen, E., Bakker, J., von den Bergh, L., & Voeten, M. (2010). Teacher attitudes toward dyslexia: Effects on teacher expectations and the academic achievement of students with dyslexia. Journal of Learning Disabilities, 43(6), 515-529.

assessments to students when they know the students will struggle to complete the general assessment because, without more supports, it would be too challenging for the students. The commenters expressed concern that this experience would affect their self-esteem and result in higher drop-out rates for students with disabilities.

Discussion: Since the regulations permitting States to define modified academic achievement standards and develop alternate assessments based on those standards were promulgated in 2007, there has been significant research and progress in developing assessments that are appropriate and accessible for most students, including students with disabilities for whom alternate assessments based on modified academic achievement standards were intended. As discussed in the NPRM, the application of universal design principles, new technologies, and new research on accommodations has led to the development of general assessments that are not only more accessible to students with disabilities, but also improve the validity of their scores. As a number of commenters noted, the developers of the new generation of assessments considered the needs of students with disabilities to ensure that the assessments are designed to allow those students to demonstrate their



knowledge.<sup>9</sup>

The Department shares the goal that students with disabilities experience success. Removing the authority for modified academic achievement standards and an alternate assessment based on those standards furthers this goal because students with disabilities who are assessed based on grade-level academic achievement standards will receive instruction aligned with such an assessment.

Changes: None

Comments: Some commenters stated that it is unfair for students with disabilities to have modifications in instruction during the school year and then be assessed with a test that is not modified.

Discussion: For purposes of this response, we assume “modifications in instruction” means accommodations authorized under the IDEA. While the IDEA does authorize adaptations in the content, methodology, or delivery of instruction (34 CFR 300.39(b)(3)), it also requires appropriate accommodations during testing (34 CFR 300.160(a) and 300.320(a)(6)(i)). These accommodations, as

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<sup>9</sup> For additional information on assessment accommodations, see: PARCC Accessibility Features and Accommodations Manual (Nov. 2014) at [http://www.parcconline.org/sites/parcc/files/parcc-accessibility-features-accommodations-manual-11-14\\_final.pdf](http://www.parcconline.org/sites/parcc/files/parcc-accessibility-features-accommodations-manual-11-14_final.pdf)

agreed upon by a child's IEP team, which includes the child's parents along with school officials, may include, among other things, small group testing, frequent breaks, a separate or alternate location, a specified area or seating, and adaptive and specialized equipment or furniture. As permitted under the IDEA and determined appropriate by a student's IEP team, the Department believes that students with disabilities who take a general assessment based on a State's challenging academic achievement standards should be provided with accommodations during the assessment that are similar to the IEP accommodations they receive for instructional purposes and for other academic tests or assessments so that the students can be involved in, and make progress in, the general education curriculum. These regulations will not prevent the provision of needed supports to students with disabilities during general assessments or for other instructional purposes.

Changes: None.

Comments: One commenter expressed support for the proposed regulations, stating that alternate assessments based on modified academic achievement standards do not take into account a student's disability and the content of the

instruction he or she is provided, and do not provide meaningful information to school districts or accurately measure the student's progress. However, the commenter maintained that the new general assessments, although more accessible, may be too difficult for students who currently participate in an alternate assessment based on modified academic achievement standards. Instead, the commenter recommended allowing States to base participation in the general assessment on a student's instructional level, rather than chronological age, with a cap of counting no more than two percent of proficient scores for ESEA accountability purposes.

Discussion: The commenter's recommendation to allow States to base participation in the general assessment on a student's instructional level is often referred to as "out-of-level" or "off-grade level" testing and generally refers to the practice of assessing a student enrolled in one grade using a measure that was developed for students in a lower grade. By definition, an out-of-level assessment cannot meet the requirements of a grade-level assessment because it does not measure mastery of grade-level content or academic achievement standards. In addition, out-of-level testing is often associated with lower expectations

for students with disabilities, tracking such students into lower-level curricula with limited opportunities to succeed in the general education curriculum.

The Department disagrees with the commenter's statement that the new general assessments may be too difficult for students who currently participate in an alternate assessment based on modified academic achievement standards. We learned through States that received funding from the Department through the GSEG and EAG programs that some students with disabilities who might be candidates for an alternate assessment based on modified academic achievement standards may not have had an opportunity to learn grade-level content, and more effort was needed to support teachers in ensuring students have meaningful opportunities to learn grade-level content. Six of the projects found that students who might be candidates for an alternate assessment based on modified academic achievement standards had difficulty using printed materials in certain formats or demonstrated other specific challenges related to some components of reading. Other projects focused on the appropriateness of test items and identified various

ways to improve the accessibility of test items, while still measuring grade-level content.<sup>10</sup>

Changes: None.

Comments: Some commenters stated that preparing students to be "college ready" should not be a goal for all public school students.

Discussion: We understand that not all students will enter a four-year college upon graduating from high school.

However, we strongly believe that public schools should prepare all children to be ready for college or the workforce. According to research from the American Diploma Project, nearly two-thirds of new jobs require some form of postsecondary education.<sup>11</sup> Therefore, in order to compete in the 21st century, regardless of whether a student has a disability, some form of postsecondary training or education is increasingly important for the student to become a productive and contributing adult.

Changes: None.

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<sup>10</sup> For more information, see: Thurlow, M. L., Lazarus, S. S., & Bechard, S. (Eds.). (2013). *Lessons learned in federally funded projects that can improve the instruction and assessment of low performing students with disabilities*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

<sup>11</sup> Achieve. (2012). *The Future of the U.S. Workforce: Middle Skills Jobs and the Growing Importance of Post Secondary Education*. American Diploma Project, [www.achieve.org](http://www.achieve.org)

## Responsibilities of IEP Teams and Students' Participation in Assessments

Comments: Many commenters expressed concern that no longer permitting the use of alternate assessments based on modified academic achievement standards and requiring students to take the general State assessments conflict with IDEA requirements. The commenters argued that the IDEA requires a student's education to be individualized in an IEP and not standardized with an assessment designed for the general student population. A few commenters stated that a student's IEP team is responsible for making educational decisions for the student and should decide whether an alternate assessment based on modified academic achievement standards or a new more accessible general assessment is the more appropriate assessment for the student.

Discussion: The commenters are correct that the IDEA assigns the IEP team the responsibility for determining how a student with a disability participates in a State or district-wide assessment, including assessments required under title I of the ESEA (34 CFR 300.320(a)(6) and 300.160(a)). This IEP team responsibility is essential, given the importance of including all children with

disabilities in a State's accountability system. These final regulations do not contravene this IEP team responsibility.

The IDEA, Part B regulations at 34 CFR 300.320(a)(6) address what each student's IEP must contain regarding participation in State and district-wide assessments. Each child's IEP must include, among other things: (1) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments and (2) if the IEP team determines that a student with a disability must take an alternate assessment, a statement of why the child cannot participate in the regular assessment, and why the particular alternate assessment selected is appropriate for the child.

Under these final regulations, to ensure that students with disabilities are appropriately included in assessments conducted under title I, an IEP team will continue to have the authority and responsibility to determine whether students with disabilities should take the regular assessment with or without appropriate accommodations, an alternate assessment based on grade-level academic achievement standards, if any, or, for students with the

most significant cognitive disabilities, an alternate assessment based on alternate academic achievement standards.

Although an IEP team determines how a student with a disability participates in general State and district-wide assessments, States are responsible for adopting general and alternate assessments, consistent with applicable Title I regulations. Accordingly, IEP teams will continue to determine which assessment a student with a disability will take in accordance with 34 CFR 300.320(a)(6), and the final regulations in 34 CFR 300.160(c) and 200.6(a)(2). However, under these final regulations, an IEP team may no longer select an alternate assessment based on modified academic achievement standards to assess students with disabilities under title I of the ESEA.

Changes: None.

Comments: Many commenters opposed the proposed amendments because they oppose standardized tests for students with disabilities. Some commenters stated that standardized tests cannot measure the achievement and progress of a student with a disability, particularly a student who is far behind academically. The commenters offered several alternatives to standardized assessments for students with



disabilities including assessments that are specialized and personalized for each student; assessments that are based on each student's daily class work and cognitive level, rather than their age; assessments that use standards for passing that are developed by a student's IEP team; and individualized assessments that measure growth. Other commenters suggested allowing States to use a number of assessments to measure achievement for students with disabilities, rather than a single general assessment. A few commenters recommended using measures other than assessments to document the achievement of students with disabilities such as data on classroom performance collected by teachers and a student's progress toward meeting his or her IEP goals.

Finally, some commenters recommended that States, districts, and schools use measures other than performance on standardized assessments as evidence of success in educating students with disabilities. For example, commenters recommended using the number of students passing workforce certification tests, the number of students employed in a skilled job after high school, or the number of students who effectively use a college's disability assistance center.

Discussion: The assessment and accountability provisions of title I require that all students, including students with disabilities, be included in Statewide standardized assessments. 20 U.S.C. 6311(b) (3) (C) (ix); 34 CFR 200.6. Section 612(a) (16) (A) of the IDEA and 34 CFR 300.160(a) also provide that all children with disabilities must be included in all general State and district-wide assessments, including assessments described under section 1111 of the ESEA, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective IEPs. Parents and teachers have the right and need to know how much progress all students, including students with disabilities, are making each year toward college and career readiness. That means all students, including students with disabilities, need to take annual Statewide assessments. Accordingly, the commenters' proposals of alternative methods to measure the achievement of students with disabilities are inconsistent with title I and IDEA.

Changes: None.

Comments: Some commenters who supported the proposed regulations stated that not holding all students to the same standards has resulted in excusing districts from

their responsibility to educate students with disabilities based on the general curriculum. For example, one parent whose child participated in an alternate assessment based on modified academic achievement standards commented that the child received instruction that was not based on the general education curriculum, contrary to the requirements of the IDEA.

Discussion: Current IDEA regulations (34 CFR 300.320(a)(1)(i) and (4)(ii)) require that each child with a disability must receive instruction designed to enable the child to be involved in, and make progress in, the general education curriculum - i.e., the same curriculum as for nondisabled students. The importance of this requirement cannot be overemphasized. As the Department stated in the Analysis of Comments to the 2006 IDEA, Part B regulations, "[w]ith regard to the alignment of the IEP with the State's content standards, §300.320(a)(1)(i) clarifies that the general education curriculum means the same curriculum as all other children. Therefore, an IEP that focuses on ensuring that a child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 FR 46540, 46662 (Aug. 14, 2006).

Under section 1111(b)(1)(B) of the ESEA, a State must apply its challenging academic content standards to all children in the State, including all children with disabilities. Section § 200.1(a)-(b) of the current title I regulations defines State academic content standards as grade-level standards. The Title I regulations permitting a State to define modified academic achievement standards and to administer alternate assessments based on those standards in assessing the academic progress of students with disabilities were not intended to change the requirement that those standards be based on challenging academic content standards. In fact, §200.1(f)(2)(iii) of the current title I regulations provides that, if the IEPs of students assessed against modified academic achievement standards include goals for the subjects to be assessed, the IEPs of such students assessed based on modified academic achievement standards must include "goals based on the academic content standards for the grade in which a student is enrolled." This provision has been removed because the authority to define modified academic achievement standards and administer alternate assessments based on those standards, has been removed. However, IEPs for all students with disabilities must continue to be

aligned with a State's academic content standards and include annual goals, special education and related services, and supplementary aids and services and other supports that are designed to enable the student to be involved in, and make progress in, the general education curriculum based on the State's academic content standards. As explained in the Senate Report accompanying the 2004 reauthorization of the IDEA, "[f]or most students with disabilities, many of their IEP goals would likely conform to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB. IEPs would also include other goals that the IEP Team deemed appropriate for the student, such as life skills, self-advocacy, social skills, and desired post-school activities. Moreover, since parents will receive individual student reports on their child with a disability's achievement on assessments under NCLB, they will have additional information to evaluate how well their children are doing against grade-level standards." S. Rep. No. 108-185, 105th Cong., 1st Sess. 29 (Nov. 3, 2003). Reading the IDEA and ESEA requirements together, it is incumbent upon States and school districts to ensure that

the IEPs of students with disabilities who are being assessed against grade-level academic achievement standards include content and instruction that gives these students the opportunity to gain the knowledge and skills necessary for them to meet those challenging standards. We strongly urge States and school districts to provide IEP Teams with technical assistance on ways to accomplish this, consistent with the purposes of the IDEA and the ESEA. Technical assistance is available from the following resources:

National Center on Educational Outcomes

<http://www.cehd.umn.edu/nceo/default.html> and The Center on Standards and Assessments Implementation <http://csai-online.org/>.

Changes: None.

Timeline to Discontinue Alternate Assessments Based on Modified Academic Achievement Standards

Comments: A number of commenters stated that eliminating the authority of a State to use alternate assessments based on modified academic achievement standards beginning in the 2014-2015 school year is premature. Some commenters stated that a more appropriate time to discontinue use of alternate assessments based on modified academic achievement standards would be after the 2014-2015 school

year when many States would have completed their field tests and implemented new assessments aligned with college- and career-ready standards. One commenter referenced a report that stated that 10 to 15 percent of students with disabilities have disabilities that would preclude them from meeting new college- and career-ready standards. The commenter concluded that these estimates raise questions as to whether the new general assessments will be appropriate for all students with disabilities (with the exception of students with the most significant cognitive disabilities who are eligible to take an alternate assessment based on alternate academic achievement standards). The commenters asserted that a State should retain the authority to administer alternate assessments based on modified academic achievement standards until there is information about how adequately the new general assessments include students with disabilities who currently take an alternate assessment based on modified academic achievement standards.

Another commenter raised concerns about phasing out alternate assessments based on modified academic achievement standards at the same time that States are implementing new general assessments. The commenter stated

that, at such a time of change, more flexibility rather than less flexibility should be provided to States. One commenter stated that there are indications that implementation of the new assessments will be delayed and that these delays would negatively affect students with disabilities who currently take an alternate assessment based on modified academic achievement standards.

Discussion: With respect to the commenters who stated that eliminating the authority of a State to use alternate assessments based on modified academic achievement standards beginning in the 2014-2015 school year is premature, we disagree. We continue to believe that eliminating the authority for alternate assessments based on modified academic achievement standards to assess the academic progress of students with disabilities under title I of the ESEA at the same time those students are included in new general assessments is in the best interest of the students. All States that had implemented alternate assessments based on modified academic achievement standards have now adopted college-and career-ready standards. These States are all administering general assessments aligned to college- and career-ready standards in 2014-2015. To the extent those are RTTA assessments,



they will not be delayed. Moreover, the RTTA assessments were field tested in 2013–2014 and those field tests included students assessed with an alternate assessment based on modified academic achievement standards. As a result, students with disabilities who previously participated in an alternate assessment based on modified academic achievement standards are making the transition to new general assessments along with their peers and have had the same benefit as their peers of instruction designed to meet new college- and career-ready standards. Therefore, it is appropriate that students with disabilities be assessed in 2014–2015 with the new general assessments that are aligned with their instruction.

Changes: None.

Comments: None.

Discussion: When the proposed regulations were published on August 23, 2013 (78 FR 52467), we anticipated finalizing the regulations prior to the end of the 2013–2014 school year. Therefore, we proposed regulations to allow States that administered alternate assessments based on modified academic achievement standards during the 2013–2014 school year to continue to administer those assessments and to use the results for accountability purposes through the 2013–

2014 school year. Given that the final regulations were not published prior to the end of the 2013-2014 school year, several of the proposed regulations are no longer necessary. We are, therefore, removing proposed regulations that refer to the conditions under which a State could continue to use modified academic achievement standards and to administer alternate assessments based on those standards until the end of the 2013-2014 school year.

We also are amending current Title I regulations and making conforming changes to current IDEA regulations to remove provisions related to alternate assessments based on modified academic achievement standards and references to "modified academic achievement standards." We did not include these changes in the NPRM because these provisions were still necessary during the 2013-2014 transition year provided for in the proposed regulations. Now that the transition year has passed, there is no longer a need to retain references to "modified academic achievement standards" or alternate assessments aligned with those standards, except for the provisions regarding reporting on the number of students with disabilities taking alternate assessments based on modified academic achievement standards in years prior to 2015-2016. In assessing the

academic progress of students with disabilities under title I of the ESEA, a State retains its authority to continue to administer alternate assessments based on grade-level academic achievement standards, consistent with 34 CFR 200.6(a)(2)(ii)(A) and revised 300.160(c)(1).

Additionally, a State retains its authority to adopt alternate academic achievement standards, as permitted in 34 CFR 200.1(d), and to measure the achievement of students with the most significant cognitive disabilities against those standards, as permitted in 34 CFR 200.6(a)(2)(ii)(B) and 300.160(c)(2)(iii) (new 300.160(c)(2)(ii)). As described below, we are making changes to §§200.1, 200.6, 200.13, and 200.20 in the Title I regulations and §300.160 in the IDEA regulations.

Changes: Changes to §200.1: We are removing proposed paragraphs (e)(2) and (e)(4) (both of which refer to conditions under which a State could continue to administer alternate assessments based on modified academic achievement standards until the end of the 2013-2014 school year) and revising proposed paragraph (e)(1) (now paragraph (e)) to state that a State may not define modified academic achievement standards for any students with disabilities. We are removing as no longer necessary current paragraph

(e)(2) (proposed redesignated paragraph (e)(3)), which sets out the criteria a State must establish for IEP teams to use to identify students with disabilities who were eligible to be assessed based on modified academic achievement standards. In addition, we are revising current paragraph (f) regarding State guidelines to remove all references to "modified academic achievement standards." The requirements in current paragraph (f) applicable to alternate academic achievement standards remain unchanged and fully applicable to a State that has adopted such standards.

Changes to §200.6: We are removing proposed paragraph (a)(3) so that a State may no longer measure the achievement of students with disabilities based on modified academic achievement standards, redesignating current paragraph (a)(4) as new paragraph (a)(3), and revising new paragraph (a)(3)(iv) (current paragraph (a)(4)(iv)) to require a State to report to the Secretary the number and percentage of children with disabilities, if any, participating in alternate assessments based on modified academic achievement standards in school years prior to 2015-2016.

Changes to current §200.13: We are revising current paragraph (c) to remove references to “modified academic achievement standards,” references to the 2.0 percent cap on proficient and advanced scores of students taking alternate assessments based on modified academic achievement standards, and the Appendix.

The requirements in current paragraph (c) applicable to alternate academic achievement standards remain unchanged and fully applicable to a State that has adopted such standards.

Changes to current §200.20: We are revising current paragraph (c)(3) to remove the reference to “modified academic achievement standards.” The requirements in current paragraph (c)(3) applicable to alternate academic achievement standards remain unchanged and fully applicable to a State that has adopted such standards. We also are removing current paragraph (g) (which describes a transition provision related to modified academic achievement standards) and redesignating current paragraph (h) as new paragraph (g).

Changes to current §300.160: We are revising §300.160 of the IDEA regulations, which addresses participation of students with disabilities in assessments, to make

conforming changes with those made in the Title I regulations. We are removing current paragraph(c)(2)(ii), which authorizes alternate assessments based on modified academic achievement standards, as permitted in 34 CFR 200.1(e), in assessing the academic progress of students with disabilities under title I of the ESEA; and redesignating current paragraph (c)(2)(iii) as paragraph (c)(2)(ii). We are adding a new paragraph (c)(2)(iii) to make clear that, except as provided in paragraph (c)(2)(ii), a State's alternate assessments, if any, must measure the achievement of children with disabilities against the State's grade-level academic achievement standards, consistent with 34 CFR 200.6(a)(2)(ii)(A).

Consistent with 34 CFR 200.1(e), we are adding paragraph (c)(3) to make clear that a State may no longer adopt modified academic achievement standards for any students with disabilities under section 602(3) of the IDEA. We are revising current paragraphs (d) and (e) to remove references to "modified academic achievement standards". Finally, we are revising current paragraphs (f)(3) and (f)(5) to require a State to report to the Secretary the number and performance results, respectively, of children with disabilities, if any, participating in

alternate assessments based on modified academic achievement standards in school years prior to 2015-2016.

The requirements in current paragraphs (c), (d), (e), and (f) applicable to alternate academic achievement standards for students with the most significant cognitive disabilities remain unchanged and fully applicable to a State that has adopted such standards.

#### Technical Assistance and Monitoring

Comments: Several commenters offered suggestions regarding the technical assistance needed to help States, teachers, and students transition from alternate assessments based on modified academic achievement standards to new, more accessible general assessments. Some commenters recommended providing technical assistance to help States develop plans to phase out alternate assessments based on modified academic achievement standards, including support for technical issues such as measuring student growth when data on two years of performance on the same assessment are not available. Other commenters stated that technical assistance is needed to ensure that students with disabilities receive appropriate instruction and supports to allow them to successfully participate in the general assessment. Commenters also emphasized the need to provide

training and professional development to all educators to ensure that students with disabilities have meaningful access to the general curriculum, and to emphasize the importance of educating IEP teams, including parents, on determining the appropriate assessments for students with disabilities.

Other commenters stated that States that implemented alternate assessments based on modified academic achievement standards learned important lessons, as did States that elected not to administer these alternate assessments and focus on improving student outcomes. The commenters recommended that the Department gather this information and use it to promote best practices for including students with disabilities in assessments required for accountability measures under the ESEA.

Some commenters encouraged the Department to monitor schools and States to ensure that supports are provided to students with disabilities who previously participated in alternate assessments based on modified academic achievement standards.

Discussion: The Department is supporting States in their transition to more accessible general assessment systems. In February 2014, the Department's Office of Elementary and



Secondary Education (OESE) and Office of Special Education and Rehabilitative Services (OSERS) sponsored a meeting, "Successfully Transitioning Away from the 2% Assessment," for State teams to jointly learn from and plan for discontinuing the implementation of alternate assessments based on modified academic achievement standards. Materials from this meeting are posted at [www.cehd.umn.edu/nceo/AAMAStransition/default.html](http://www.cehd.umn.edu/nceo/AAMAStransition/default.html). The Department currently funds several technical assistance centers that provide resources on students with disabilities and the instructional supports they need to access the general curriculum and participate in the general assessment (e.g., the Center for Standards and Assessment Implementation; see <http://csai-online.org/>). Moreover, several technical assistance centers provide resources that specifically address the needs of students who have persistent academic and behavioral needs that require intensive intervention to succeed in school and prepare them to be college and career ready (e.g., the National Center on Intensive Intervention; see <http://www.intensiveintervention.org/>). In addition, the federally funded Parent Training and Information Centers (<http://www.parentcenterhub.org/>) focus on ensuring that

parents of children with disabilities have the information they need to participate effectively in their child's education, including making decisions about the assessments that are appropriate for their child. OESE and OSERS will continue to work collaboratively with the Department's federally funded technical assistance and dissemination partners to ensure that all students, including students with disabilities, have the supports and instruction they need to meet college- and career-ready standards.

With regard to commenters who recommended the Department compile information learned by States that implemented alternate assessments based on modified academic achievement standards, we note that the work funded by the Department through the GSEG and EAG programs has contributed to the knowledge base about students who are struggling in school. Projects funded by these programs focused on a number of topics, including the characteristics of students who participated in alternate assessments based on modified academic achievement standards, barriers to their learning and performance, and approaches to making assessments more accessible. Several State projects that focused on instructional matters found that more effort was needed to support teachers in ensuring

students with disabilities have meaningful opportunities to learn grade-level content. Other projects focused on the appropriateness of test items and identified various ways to improve the accessibility of test items, such as examining the difficulty of test items and making items more accessible and understandable without changing the knowledge or skill that is being measured (e.g., reducing unimportant or extraneous details from test items). The lessons learned from these projects are in "Lessons Learned in Federally Funded Projects that Can Improve the Instruction and Assessment of Low Performing Students with Disabilities," available at:

<http://www.cehd.umn.edu/nceo/onlinepubs/lessonslearned.pdf>.

With respect to commenters who urged the Department to monitor to ensure that supports are provided to students with disabilities who previously participated in alternate assessments based on modified academic achievement standards, pursuant to 34 CFR 300.149(b) and 300.600, an SEA must monitor public agencies' implementation of the Act and Part B regulations and ensure timely correction of any identified noncompliance. We expect, therefore, that SEAs will monitor compliance with the provisions in 34 CFR 300.160.

Changes: None.

Comments: A few commenters advised the Department to monitor data on the percentage of students participating in alternate assessments based on alternate academic achievement standards following the phase out of alternate assessments based on modified academic achievement standards. One commenter stated that the Department should publish the assessment data from the 2012-2013 school year as part of the final regulations, including the number and percentage of students with disabilities who took the general assessment and the number and percentage of students who took an alternate assessment based on modified academic achievement standards, and the proficiency rates for each group.

Discussion: Pursuant to the authority of section 618(a)(3) of the IDEA, the Secretary requires States to report the number of students with disabilities who took (1) the general assessment, with and without accommodations; (2) the alternate assessment based on modified academic achievement standards; (3) the alternate assessment based on grade-level academic achievement standards; and (4) the alternate assessment based on alternate academic achievement standards. These data will help SEAs monitor

whether the number of students who take an alternate assessment based on alternate academic achievement standards increases significantly with the elimination of alternate assessments based on modified academic achievement standards.

Under title I and IDEA, States also are required to report the number of students with disabilities who scored at each academic achievement (performance) level (e.g., basic, proficient, above proficient). These numbers can be aggregated to derive the number of students with disabilities who scored at or above proficient on each assessment. However, States are not required to report the percentages of students with disabilities who scored at or above proficient on each assessment. The most recent year for which data are available is 2011-2012. For additional information on these data and links to the data files see: <https://inventory.data.gov/dataset/95ca1187-69f5-4e70-9f8c-6bbbb3d6d94a/resource/446d130d-5160-4c27-a428-317c6333b38f>. In addition, the Department routinely publishes on its Web site States' Consolidated State Performance Reports (CSPR), which include data on the number and percentage of students with disabilities who participate in the general assessment and each type of

alternate assessment (i.e., an alternate assessment based on alternate academic achievement standards, an alternate assessment based on modified academic achievement standards, and an alternate assessment based on grade-level academic achievement standards). The percentage of students with disabilities who score at or above proficient is also reported, but is not disaggregated by type of assessment (general versus alternate assessment). These data are posted at:

[www2.ed.gov/admins/lead/account/consolidated/index.html](http://www2.ed.gov/admins/lead/account/consolidated/index.html).

Therefore, we decline to include the assessment data from the 2012-2013 school year in the final regulations, as requested by one commenter.

Changes: None.

#### Alternate Assessments Based on Alternate Academic Achievement Standards

Comments: Several commenters wrote about the need for alternate assessments for students with the most significant cognitive disabilities. One commenter asked how the proposed regulations would affect students with the most significant cognitive disabilities who take alternate assessments based on alternate academic achievement standards.

Discussion: The proposed regulations do not affect the assessment of students with the most significant cognitive disabilities. A State continues to have the authority under 34 CFR 200.1(d) and 200.6(a)(2)(ii)(B) to define alternate academic achievement standards, administer alternate assessments based on those alternate academic achievement standards, and, subject to the one percent limitation on the number of proficient scores that may be counted for accountability purposes, include the results in accountability determinations.

Changes: None.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment,

public health or safety, or State, local, or tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs



(recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory

Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined are necessary for administering the Department's programs and activities.

Potential Costs and Benefits: Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action and have determined that these regulations would not impose additional costs to States and LEAs or to the Federal government. For example, forty-two States, the District of Columbia, and Puerto Rico agreed, in order to receive ESEA flexibility, to phase out their use of alternate assessments based on modified academic achievement standards, if they had those assessments, by the 2014–2015 school year. Only two States have an alternate assessment based on modified academic achievement standards but have not received ESEA flexibility. Moreover, these regulations do not impose additional costs or administrative burdens because States, including the two discussed in the preceding sentence, are already developing and implementing general assessments aligned with college- and career-ready standards that will be more accessible to students with disabilities than those in place at the time States began developing alternate assessments based on modified academic achievement standards. These new assessments must be valid, reliable, and fair for all student subgroups, including students with disabilities, with the exception of students with the most significant

cognitive disabilities who are eligible to participate in alternate assessments based on alternate academic achievement standards consistent with 34 CFR 200.6(a)(2)(ii)(B) (see 75 FR 18171, 18173 (Apr. 9, 2010)).

In this context, these regulations largely reflect already planned and funded changes in assessment practices and do not impose additional costs on States or LEAs or the Federal government. On the contrary, to the extent that these regulations reinforce the transition to State assessment systems with fewer components, the Department believes these regulations ultimately will reduce the costs of complying with ESEA assessment requirements, because States would no longer develop and implement separate alternate assessments based on modified academic achievement standards based on the new college- and career-ready standards.

Further, to the extent that States must transition students with disabilities who took an alternate assessment based on modified academic achievement standards to new general assessments, funding to support such a transition is available through existing ESEA programs, such as the Grants for State Assessments program, which made available

\$378 million in State formula grant assistance in fiscal year 2015.

In sum, any additional costs imposed on States by these final regulations are estimated to be negligible, primarily because they reflect changes already under way in State assessment systems under the ESEA. Moreover, we believe any costs will be significantly outweighed by the potential educational benefits of increasing the access of students with disabilities to the general assessments as States develop new, more accessible assessments, including assessments aligned with college- and career-ready standards.

#### Regulatory Alternatives Considered

An alternative to these final regulations would be for the Secretary to leave in place the existing regulations permitting a State to define modified academic achievement standards and to develop and administer alternate assessments based on those standards. However, the Secretary believes that these amended regulations are needed to help refocus assessment efforts and resources on the development of new general assessments that are accessible to a broader range of students with disabilities. Such new general assessments will eliminate

the usefulness of separate alternate assessments based on modified academic achievement standards for eligible students with disabilities.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Assessment of Educational Impact

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to either of the program contact persons listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the Federal Register. Free Internet access to the official edition of the Federal Register and the Code of Federal Regulations is available via the Federal Digital System at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys). At this site you can view this

document, as well as all other documents of this Department published in the Federal Register, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the Federal Register by using the article search feature at: [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

#### List of Subjects

##### 34 CFR Part 200

Education of disadvantaged, Elementary and secondary education, Grant programs-education, Indians-education, Infants and children, Juvenile delinquency, Migrant labor, Private schools, Reporting and recordkeeping requirements.

##### 34 CFR Part 300

Administrative practice and procedure, Education of individuals with disabilities, Elementary and secondary education, Equal educational opportunity, Grant programs-education, Privacy, Private schools, Reporting and recordkeeping requirements.

Dated: August 18, 2015.

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Arne Duncan,  
Secretary of Education.



For the reasons discussed in the preamble, the Secretary amends parts 200 and 300 of title 34 of the Code of Federal Regulations as follows:

PART 200--TITLE I--IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

1. The authority citation for part 200 continues to read as follows:

AUTHORITY: 20 U.S.C. 6301 through 6578, unless otherwise noted.

2. Section 200.1 is amended by:

A. In paragraph (a)(1), removing the words "paragraphs (d) and (e) of this section, which apply" and adding, in their place, the words "paragraph (d) of this section, which applies".

B. In paragraph (a)(2), removing the words "paragraphs (d) and (e)" and adding, in their place, the words "paragraph (d)".

C. Revising paragraphs (e) and (f).

The revisions read as follows:

§200.1 State responsibilities for developing challenging academic standards.

\* \* \* \* \*

(e) Modified academic achievement standards. A State may not define modified academic achievement standards for any students with disabilities under section 602(3) of the Individuals with Disabilities Education Act (IDEA).

(f) State guidelines. If a State defines alternate academic achievement standards under paragraph (d) of this section, the State must do the following:

(1) Establish and monitor implementation of clear and appropriate guidelines for IEP teams to apply in determining students with the most significant cognitive disabilities who will be assessed based on alternate academic achievement standards.

(2) Inform IEP teams that students eligible to be assessed based on alternate academic achievement standards may be from any of the disability categories listed in the IDEA.

(3) Provide to IEP teams a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State and local policies on the student's education resulting from taking an alternate assessment based on alternate academic achievement standards (such as whether

only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma).

(4) Ensure that parents of students selected to be assessed based on alternate academic achievement standards under the State's guidelines in this paragraph are informed that their child's achievement will be measured based on alternate academic achievement standards.

\* \* \* \* \*

3. Section 200.6 is amended by:

A. Removing paragraph (a) (3).

B. Redesignating paragraph (a) (4) as (a) (3).

C. Revising newly redesignated paragraph (a) (3) (iv).

The revision reads as follows:

§200.6 Inclusion of all students.

\* \* \* \* \*

(a) \* \* \*

(3) \* \* \*

(iv) Alternate assessments based on modified academic achievement standards in school years prior to 2015-2016;  
and

\* \* \* \* \*

4. Section 200.13 is amended by:

A. Revising paragraph (c).

B. Removing the Appendix.

The revision reads as follows:

§200.13 Adequate yearly progress in general.

\* \* \* \* \*

(c) (1) In calculating AYP for schools, LEAs, and the State, a State must, consistent with §200.7(a), include the scores of all students with disabilities.

(2) A State may include the proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards described in §200.1(d), provided that the number of those scores at the LEA and at the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics.

(3) A State may not request from the Secretary an exception permitting it to exceed the cap on proficient and advanced scores based on alternate academic achievement standards under paragraph (c) (2) of this section.

(4) (i) A State may grant an exception to an LEA permitting it to exceed the 1.0 percent cap on proficient and advanced scores based on the alternate academic

achievement standards described in paragraph (c)(2) of this section only if--

(A) The LEA demonstrates that the incidence of students with the most significant cognitive disabilities exceeds 1.0 percent of all students in the combined grades assessed;

(B) The LEA explains why the incidence of such students exceeds 1.0 percent of all students in the combined grades assessed, such as school, community, or health programs in the LEA that have drawn large numbers of families of students with the most significant cognitive disabilities, or that the LEA has such a small overall student population that it would take only a few students with such disabilities to exceed the 1.0 percent cap; and

(C) The LEA documents that it is implementing the State's guidelines under §200.1(f).

(ii) The State must review regularly whether an LEA's exception to the 1.0 percent cap is still warranted.

(5) In calculating AYP, if the percentage of proficient and advanced scores based on alternate academic achievement standards under §200.1(d) exceeds the cap in paragraph (c)(2) of this section at the State or LEA level, the State must do the following:

(i) Consistent with §200.7(a), include all scores based on alternate academic achievement standards.

(ii) Count as non-proficient the proficient and advanced scores that exceed the cap in paragraph (c)(2) of this section.

(iii) Determine which proficient and advanced scores to count as non-proficient in schools and LEAs responsible for students who are assessed based on alternate academic achievement standards.

(iv) Include non-proficient scores that exceed the cap in paragraph (c)(2) of this section in each applicable subgroup at the school, LEA, and State level.

(v) Ensure that parents of a child who is assessed based on alternate academic achievement standards are informed of the actual academic achievement levels of their child.

\* \* \* \* \*

5. Section 200.20 is amended by:

A. Revising paragraph (c)(3).

B. Removing paragraph (g).

C. Redesignating paragraph (h) as paragraph (g).

The revision reads as follows:

§200.20 Making adequate yearly progress.

\* \* \* \* \*

(c) \* \* \*

(3) To count a student who is assessed based on alternate academic achievement standards described in §200.1(d) as a participant for purposes of meeting the requirements of this paragraph, the State must have, and ensure that its LEAs adhere to, guidelines that meet the requirements of §200.1(f).

\* \* \* \* \*

PART 300--ASSISTANCE TO STATES FOR THE EDUCATION OF  
CHILDREN WITH DISABILITIES

6. The authority citation for part 300 continues to read as follows:

AUTHORITY: 20 U.S.C. 1221e-3, 1406, 1411-1419, 3474, unless otherwise noted.

7. Section 300.160 is amended by:

A. Removing paragraph (c)(2)(ii).

B. Redesignating paragraph (c)(2)(iii) as (c)(2)(ii).

C. In newly redesignated paragraph (c)(2)(ii), removing the final punctuation "." and adding, in its place, "; and".

D. Adding a new paragraph (c)(2)(iii).

E. Adding a new paragraph (c)(3).

F. Revising paragraphs (d), (e), (f)(3), and (f)(5) introductory text.

The revisions and additions read as follows:

§300.160 Participation in assessments.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) Except as provided in paragraph (c)(2)(ii) of this section, a State's alternate assessments, if any, must measure the achievement of children with disabilities against the State's grade-level academic achievement standards, consistent with 34 CFR 200.6(a)(2)(ii)(A).

(3) Consistent with 34 CFR 200.1(e), a State may not adopt modified academic achievement standards for any students with disabilities under section 602(3) of the Act.

(d) Explanation to IEP teams. A State (or in the case of a district-wide assessment, an LEA) must provide IEP teams with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on alternate academic achievement standards, including any effects of State or local policies on the student's education resulting from taking an alternate assessment based on alternate academic



achievement standards (such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma).

(e) Inform parents. A State (or in the case of a district-wide assessment, an LEA) must ensure that parents of students selected to be assessed based on alternate academic achievement standards are informed that their child's achievement will be measured based on alternate academic achievement standards.

(f) \* \* \*

(3) The number of children with disabilities, if any, participating in alternate assessments based on modified academic achievement standards in school years prior to 2015-2016.

\* \* \*

(5) Compared with the achievement of all children, including children with disabilities, the performance results of children with disabilities on regular assessments, alternate assessments based on grade-level academic achievement standards, alternate assessments based on modified academic achievement standards (prior to 2015-2016), and alternate assessments based on alternate academic achievement standards if--

\* \* \* \* \*

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